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John Sharp

Comptroller of Public Accounts

Austin, Texas 78774

512/463-4000

LBJ State Office Building

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Opinion Committee

The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711

Dear General Morales:

This letter is to request your official opinion concerning the constitutionality and statutory interpretation of H. B. 1298. The bill, sponsored by Representative Hugo Berlanga and passed during the 72nd Legislature's Regular Session, amended Sec. 23.51(2) and (7), Tax Code, to include "wildlife management" in the definition of agricultural use.

Article VIII, Section 1-d-1, Texas Constitution, authorizes the Legislature to provide for taxation of open-space land which is devoted to farm or ranch purposes on the basis of its productive capacity. Pursuant to this grant of authority, the Legislature defined qualified open-space land as land "devoted principally to agricultural use" and adopted a list of activities that are "agricultural use[s]." Section 23.51, Tax Code.

H.B. 1298 amended Tax Code, Section 23.51(2) to specify that "agricultural use" includes "the use of land for wildlife management." It also added new subsection (7) to read as follows:

> (7) "Wildlife management" means using land that on January 1, 1992, was appraised as qualified open-space land under this subchapter, or that was eligible to be appraised as qualified open-space land under this subchapter, in at least two of the following ways to propagate a sustaining breeding population of indigenous wild animals to produce a harvestable surplus of these animals for human use, including food, medicine, or recreation:
>
> (A) habitat control;
> (B) erosion control;
> (C) predator control;
> (D) providing supplemental supplies of water;
> (E) providing supplemental supplies of food;
> (F) providing shelter; and
> (G) making of census counts to determine population.

Under the new law, land that meets the requirements of Sec. 23.51(7) is in agricultural use and may qualify for productivity appraisal if it meets the remaining qualification requirements imposed by Sec. 23.51(1).

There are no cases directly addressing the meaning of the constitutional term "farm or ranch use." A few cases do, however, address the question of what is agriculture.

In *Gordon v. Buster*, 257 S.W. 220, 221 (Tex. 1923), the court defined agriculture as "[t]he art or science of cultivating the ground, including harvesting of crops and rearing and management of livestock; husbandry, farming, in a broader sense, the science and act of the production of plants and animals useful to man."

same as JM-87

One recent attorney general's opinion found that mariculture was "agriculture" in the broad sense because the activity included cultivation or production. However, the AG found that harvesting marine life, to the extent it implies merely capturing animal life, is not agriculture. Att'y Gen. Op. No. JM-87 at 368 (1983).

In *Bower v. Edwards County Appraisal District*, 697 S.W.2d 528 (Tex. App.--San Antonio 1985, no writ) and again in *Bower v. Edwards County Appraisal District*, 752 S.W. 2d 629 (Tex. App.--San Antonio 1988, writ denied), the San Antonio Court of Appeals found that allowing deer owned by the State of Texas to exist on the land and graze on the natural vegetation is not an agricultural use of land.

Bower, Gordon and JM-87 may be applied to wildlife management use. In its broad sense, agriculture does not appear to include wildlife management because the owner does not cultivate the land. In addition, the owner does not actively work to produce indigenous wild animals. Instead, the owner uses the land to encourage or sustain the growth of an animal population that exists on the land.

Not "farm" but "agricultural use" use of special farm closed class

Thus, my first question is: Is the term "farm or ranch purpose," as used in Art. VIII, Sec. 1-d-1 of the Texas Constitution, broad enough to include wildlife management as defined by Sec. 23.51(7)?

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If you find that wildlife management is a "farm or ranch purpose," the next issue involves the bill's limitation on eligibility to "land that on January 1, 1992, was appraised as qualified open-space land under this subchapter, or that was eligible to be appraised as qualified open-space land under this subchapter."

H.B. 1298's legislative history shows that the object of this provision was to prevent loss of revenue by limiting wildlife management use appraisal to land that previously qualified for agricultural appraisal. This was accomplished by providing that only land that was appraised or was eligible to be appraised as qualified agricultural use land may qualify under a wildlife management use.

This limitation creates some seemingly discriminatory situations. For example, land that was devoted principally to wildlife management on January 1, 1992, is ineligible to qualify, even if it was devoted to wildlife management for five of the preceding seven years

scenic park occupied 467/230

and could meet all other eligibility requirements on January 1, 1992. Likewise, the land will be forever ineligible if the owner chooses to start wildlife management today.

A second possibly discriminatory situation occurs when an owner qualifies his land for agricultural appraisal on January 1, 1993, or later. Unless the owner can show his land was eligible to qualify for such appraisal "on January 1, 1992," he cannot convert his use to qualified wildlife management. However, his neighbor, who was otherwise qualified for agricultural appraisal on January 1, 1992, and on whose land the same wildlife most likely grazed, may qualify if he chooses to convert his use to wildlife management in 1993 or later years.

The Constitution requires that ad valorem taxation be "equal and uniform," Art. VIII, Section 1, Texas Constitution. I am uncertain whether the results in the situations described above run afoul of this provision.

Therefore, my second question is: Does the limitation of qualification to land that qualified or was eligible to qualify on January 1, 1992, meet the constitutional requirement of equal and uniform taxation?

If you find the statute constitutional, I need guidance on two issues of statutory construction that have come before me. The first concerns the effect of limiting wildlife appraisal to "land that on January 1, 1992, was appraised as qualified open-space land under this subchapter, or that was eligible to be appraised as qualified open-space land under this subchapter." Sec. 23.51(7), Tax Code.

The question arises because the bill's effective date was January 1, 1992. On that date, wildlife management use became a qualifying agricultural use. The limit applied by the first clause would be neutralized. Any land that is in wildlife management use and able to meet other qualification requirements may qualify for the appraisal because on that date the land was eligible to qualify for such appraisal under the statute as amended.

H.B. 1298's extensive legislative history shows that the object of the limitation was to prevent loss of revenue to taxing units by limiting wildlife management use appraisal to land that previously qualified for agricultural appraisal. However, the issue is whether these words limit wildlife management use to land that qualified for agricultural appraisal before the law was amended to add the wildlife management use or whether previously unqualified land used for wildlife management on January 1, 1992, may also qualify.

The first version of the H.B. 1298 did not limit qualification. On May 8, 1991, on the House floor, Representative Berlanga introduced an amendment containing the limiting language. He explained that the amended bill would not apply to any property not already entitled to agricultural appraisal. He said it would apply to land leased for deer hunting, but only if the land qualified for agricultural appraisal before January 1, 1992.

Jerry Henckle, representing the Texas Wildlife Association, testified during a public hearing held by the Senate Finance Committee on May 16, 1991. He testified that the bill

would not have a significant fiscal impact on local government because it would apply only to land already qualified for agricultural appraisal.

Both the first and second clauses appear to limit wildlife management use to land that qualified or was eligible to qualify for the unamended agricultural appraisal on January 1, 1992. Any other construction appears to open the wildlife management use appraisal up to land that did not previously qualify for agricultural appraisal and is contrary to expressed legislative intent.

Thus, my third question is: Does Sec. 23.51(7) limit qualification to land that qualified or was eligible to qualify for agricultural appraisal on January 1, 1992?

The fourth issue concerns the phrase "harvestable surplus." Sec. 23.51(7), Tax Code, reads in part as follows: "Wildlife management means using land . . . to propagate a sustaining breeding population of indigenous wild animals to produce a harvestable surplus of these animals for human use, including food, medicine, or recreation."

The term "harvest" has a specific meaning in the wildlife management field. "[I]n biological terms [harvest] means man's use of the available species . . . [i]n the case of a hunter's harvest, the word is simply a euphemism for the word kill." Wildlife Management On Your Land, Cadieux, C.L. (1985), p. 6. A harvestable surplus is defined as the number of species that may be harvested from the population without hurting the population's ability to continue to sustain itself as a breeding population at some later time. *Principles of Wildlife Management*, Allen, J. (1983), pp. 176-177; *Wildlife Management on Your Land*, Cadieux, C.L. (1985), p. 6, defining allowable harvest.

The Endangered Species Act is a federal law providing protection for endangered and threatened species. The Act prohibits any person from "taking" an endangered species. 16 U.S.C.A. 1538(1)(B). "Take" is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16

U.S.C.A. 1532(19). It is my understanding that in the wildlife management field, each of these activities is considered a "harvesting" of the animal.

State law recognizes and prohibits taking of federally protected species. In addition, the state recognizes and restricts the hunting or taking of threatened wildlife indigenous to the state. Secs. 43.021, et. seq., and Sec. 68.001, et. seq., Parks and Wildlife Code.

The federal and state prohibitions against harvesting or taking an endangered, threatened, or protected species support the conclusion that these species cannot, by definition, be included in the types of indigenous wildlife that make up a "harvestable surplus."

My fourth question is: Since an endangered, threatened, or protected species cannot be harvested or taken, is the use of land to propagate these types of animals "wildlife management" as defined by Sec. 23.51(7)?

The bill also requires that the land must be used to "propagate a sustaining breeding population of indigenous wild animals . . . for human use, including food, medicine, or recreation . . . ." If the word "use" is defined as a consumptive use, land on which animals are watched or photographed could not qualify for agricultural appraisal because the animals are not consumed or taken. Land used in a recreational activity such as hunting, in which the hunter intends to take or consume the animals, could qualify.

Discussions with wildlife management experts indicate that the "use" of the animals in the context of this statute is a consumptive use. In fact, the common meaning of the word "use" implies a consumptive use. However, Webster's Dictionary defines the verb "use" as either a non-consumptive or a consumptive use: "use" is defined as to accustom or habituate; to put into action or service; to consume or take regularly; and to carry out a purpose or action by means of.

My final question is this: Is "use" in the context of this statute a consumptive use, such as hunting, or a non-consumptive use, such as bird watching or photography, or does "use" include both consumptive and non-consumptive activities?

Thank you for considering these questions. My staff is available to answer any questions you may have about this request. Please contact my General Counsel, Cril Payne, at 463-4904, if there are any such questions.

Sincerely,

JOHN SHARP
Comptroller of Public Accounts